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No. 90-985

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?
2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?
3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?
4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?
5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents contend that opposition to abortion *per se* represents "invidiously discriminatory class-based animus" for purposes of 42 U.S.C. § 1985(3), and that any interference with mere physical movement violates a federal constitutional right to interstate travel. These claims are plainly meritless. *See* Brief for Petitioners § I. Indeed, respondents' claims do not even suffice to support federal subject matter jurisdiction. *Id.* § II.

The arguments set forth in the answering Brief for Respondents do not alter this conclusion.

STATEMENT OF THE CASE

It is indicative of the weakness of respondents' legal arguments that respondents devote a full twelve pages of their brief to an argumentative statement of the case.

Brief for Respondents at 1-12. Respondents' extended description of various incidents, in various locations, involving various unspecified persons,[1] appears calculated to portray the anti-abortion "rescue" movement in general in a very negative light[2]—as if that would compensate for legal deficiencies in respondents' cause of action.

In the opinion of respondents, direct intervention to stop abortions from taking place is a terrible thing. Such a view is perhaps not surprising, coming as it does from organizations that feel no compunction in describing the abortion of an unborn child "up to the 26th week" of pregnancy as a "service." Brief for Respondents at 9. Petitioners, however, take the opposite view. Petitioners regard *abortion itself* as a terrible thing, as the unjust execution of a child and the exploitation of that child's mother. *See, e.g.*, Plaintiffs' Exhibit 1 (Operation Rescue literature).

The task for this Court, however, is not to decide whether petitioners' cause is worthy or whether the tactics of anti-abortion "rescuers" are unseemly.[3] The issue,

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[1] Respondents make no attempt to identify any connection between particular petitioners and the incidents recounted. Instead, respondents make generic reference to unidentified "conspirators," Brief for Respondents at 10, to "a mob of blockaders," *id.* at 10-11, and to "petitioners," *id.* at 7-8, 10-11, as apparently interchangeable terms for all who take part in anti-abortion "rescues."

[2] Respondents charge that petitioners "attempt, not to assert their own legal rights as the sit-in demonstrators [of the 1960's] did, but to deny the rights of others." Brief for Respondents at 2. This polemical claim completely ignores the possibility that there might be a different side to the abortion debate—namely, a genuine concern to protect the right to life of unborn children. While respondents obviously do not share petitioners' pro-life beliefs, this does not mean that respondents cannot acknowledge that petitioners honestly embrace a fundamentally different understanding of abortion. Were respondents to acknowledge this possibility, of course, respondents' claim that opposition to abortion intrinsically reflects anti-female animus would collapse.

[3] It is perhaps worthy of note that even respondents' efforts to select the worst examples of "rescue" behavior still reveal no such violence as was found in *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983). In *Scott*, the defendants "assaulted and beat [construction] employees, and burned and destroyed construction equipment," *id.* at 828—but this Court nevertheless ruled that, *for legal reasons*, § 1985(3) did not apply to defendants' conduct.

rather, is whether a specific federal statute—42 U.S.C. § 1985(3)—applies to this case. For the reasons set forth in the Brief for Petitioners, the answer is clearly "no."

ARGUMENT

I. RESPONDENTS ARE NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1985(3).

As demonstrated in petitioners' opening brief, respondents' claim under 42 U.S.C. § 1985(3) suffers from two fatal defects; failure to establish an "invidiously discriminatory class-based animus," and failure to establish a violation of a right protected under § 1985(3). Respondents' brief provides no remedy for these defects.

A. Respondents Have Not Established the Requisite Class-Based Animus Under § 1985(3).

Respondents acknowledge that a claimant under § 1985(3) must establish the existence of an "invidiously discriminatory, class-based animus" behind the alleged wrongful conduct of the conspirators. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834-35 (1983). There are two parts to this requirement: identification of a cognizable class, and proof of a discriminatory animus against that class.

Respondents cannot satisfy this statutory requirement. "Women seeking abortions" is not a valid class under § 1985(3); moreover, opposition to abortion is not the *per se* legal equivalent of animus against women. *See* Brief for Petitioners § I(A).

1. *"Women seeking abortions" is not a valid class under § 1985(3).*

As petitioners explained in their opening brief, "women seeking abortions" is not a valid class, but rather is a contrived effort to portray opposition to an *activity*—the practice of human abortion—as opposition to a *class*.

Respondents have apparently decided to abandon their claim that "women seeking abortions" is a valid class under § 1985(3). *See* Brief for Respondents at 15 n.31. This strategic maneuver, however, runs contrary to the heavy emphasis placed upon a class of "women seeking abortions" in respondents' complaint, *see, e.g.*, Amended Complaint ¶¶ 1, 2, 26, 39, 41 (J.A. 6-7, 12, 15-16), in the opinion of the district court, 726 F. Supp. at 1492-93 (Pet. App. 29a, ¶¶ 34, 35), and in the opinion of the court of appeals, 914 F.2d at 584-85 (Pet. App. 5a-7a).[4]

By forswearing reliance upon an animus against "women seeking abortions," respondents have now chosen to rest their claim entirely upon a theory of animus against the class of women in general.[5] This Court, however, need not reach the question whether, or under what conditions, women can form a class under § 1985(3).[6]

[4] The exact phrasing of this class varies somewhat. As times respondents employ more cumbersome language, such as "women who seek the services of providers of abortions and related services," Amended Complaint ¶ 39 (J.A. 15). The phrase "women seeking abortions" serves as a convenient shorthand. *E.g.*, 726 F. Supp. at 1492 (Pet. App. 29a) (parenthetical description of holding, in another case, as "§ 1985(3) covers women seeking abortions"). Of course, respondents' alternative, more expansive (and awkward) descriptions of the supposed class pointedly illustrate the essential artificiality of the class respondents have proposed.

[5] Respondents had previously argued in the alternative, claiming a class either of women seeking abortions or women in general. *See* Amended Complaint ¶¶ 39, 41 (J.A. 15, 16) (alleging animus directed "at women and at women who seek the services of providers of abortions and related services").

[6] In arguing that women are "persons" under § 1985(3), Brief for Respondents at 16-20, respondents miss the point. Certainly

Even if women in general could form a valid class,[7] respondents' claim would fail for lack of any showing of *animus* against women.

women can be targets of illegal activity under § 1985(3)—the statute does not provide a remedy exclusively for black *men* who encounter racially discriminatory conspiracies. The statutory question, however, is not "Who are '*persons*'?" but "What is a '*purpose* of depriving' someone 'of the *equal* protection of the laws, or of *equal* privileges and immunities'?"

The "class animus" requirement derives from the phrases "equal protection" and "equal privileges and immunities" in the amended text of § 1985(3). *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). These phrases have a strong historical association with the concern for *racial* justice that motivated the constitutional amendments and civil rights legislation of the Reconstruction Era. To equate "gender" with "race" for purposes of "equal protection" would be to disregard this history and to ignore both logic and precedent. For example, this Court has held that a law imposing *racial* restrictions on marriage violates the equal protection of laws. *Loving v. Virginia*, 388 U.S. 1 (1967). But this Court has never suggested that a law imposing *gender* restrictions on marriage would violate equal protection. Indeed, it would be preposterous to claim that the framers of § 1985(3) or the fourteenth amendment believed that "equal protection" required the legal recognition of homosexual "marriages." Nor can respondents seriously contend that the myriads of people throughout history who would never think of marrying anyone other than a member of the opposite sex have somehow been guilty of "invidiously discriminatory class-based animus." In other words, while racial criteria presumptively reflect invidious prejudice—and thus unequal protection—gender distinctions are in many ways part of the essential fabric of society. Unthinkingly to equate racial categories with gender categories for purposes of federal statutory or constitutional guarantees of civil rights is to blink at reality.

[7] Respondents cite to the legislative history of the Civil Rights Act of 1871 in an effort to "prove" that § 1985(3) applies to gender-based animus. Brief for Respondents at 18-20. Respondents omit, however, certain key facts that negate the relevance of the comments respondents have selected.

For example, respondents quote Representative Buckley as stating that "'[t]he proposed legislation . . . is not to protect the colored only, but the whites also; *yes, even women . . .*'" Brief for Respondents at 19-20 (quoting Cong. Globe, 42d Cong. 1st Sess. App.

2. *Opposition to abortion is not the legal equivalent of discrimination against women.*

Respondents have not questioned the fact that the true, sincere motivation of Jayne Bray and her fellow petitioners is genuine opposition to the killing of unborn

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190 (1871)) (emphasis added by respondents). The passage from which respondents extract Rep. Buckley's comments is as follows:

> The proposed legislation is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property, liberty, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes, will be benefited alike because we are simply contending for good government and righteous laws.

The "legislation" in question was the entire civil rights act, which included the future 42 U.S.C. § 1983. *See Briscoe v. LaHue*, 460 U.S. 325, 336-37 (1983). There is no "class animus" requirement for § 1983; hence, broad comments about the scope of "the legislation" are useless in determining what classes § 1985(3) protects. *More importantly, Rep. Buckley's comments were made before the limiting amendment that produced the final version of § 1985(3) was even offered to the bill.* (Rep. Buckley made his comments on April 3, 1871. Cong. Globe, 42d Cong. 1st Sess. App. 190. The limiting amendment was offered on April 5. Cong. Globe, 42d Cong. 1st Sess. 477.) The "class animus" requirement of § 1985(3) derives directly from the limiting amendment. *See Griffin v. Breckenridge*, 403 U.S. 88, 100-02 (1971). Rep. Buckley's general, pre-amendment comments about the entire civil rights bill, therefore, have no relevance whatsoever to the specific, post-amendment "class animus" requirement of § 1985(3). Respondents' quotation of these remarks, with the claim that Rep. Buckley's words are "directly apropos of this case," Brief for Respondents at 19, is seriously misleading, to say the least.

The excerpts respondents have quoted from Rep. Lowe, Cong. Globe, 42d Cong. 1st Sess. 376, also predate the limiting amendment (Mar. 31, 1871). The quotations from Reps. Wilson (*id.* at 481, 484) and Perce (*id.* at 512) are general comments with no specific reference to the relevant terms of the limiting amendment. The quotations from Rep. Shellabarger (*id.* at 478) and Sen. Edmunds (*id.* at 567) already appear in the decisions of this Court in *Griffin* and *United Brotherhood of Carpenters v. Scott*. This Court has not found their remarks to provide decisive support for an expansive view of the classes protected under § 1985(3). *Scott*, 463 U.S. at 837.

children by abortion. The record uniformly reflects this proposition, *see* Brief for Petitioners at 20-22 (citing evidence and findings of fact), and respondents have not produced a scrap of evidence to the contrary. Respondents' claim, therefore—and the judgment of the court below—necessarily rest upon the assertion that opposition to abortion is, as a matter of law, the *per se* equivalent of animus against women. This assertion, however, merely reflects the highly controversial ideology of respondents; as such, it cannot serve as a basis for imposing liability under § 1985(3).

Respondents now concede that "opposition to abortion is not the *per se* equivalent of discrimination against women," Brief for Respondents at 24 n.41. Given the total absence of any evidence of gender-based animus, however, this concession is tantamount to an acknowledgement that respondents have no federal cause of action, and that the court below erred in affirming respondents' claim under § 1985(3). *See* Brief for Petitioners at 20-24.

Respondents nevertheless persist in arguing that efforts to prevent abortion necessarily reflect an animus against women. Brief for Respondents at 24-35. No explanation for this contradiction appears in respondents' brief. In any event, the arguments respondents marshal in support of this *per se* claim are unconvincing.

Respondents point out that only women can bear children, and therefore only women can undergo abortion. *Id.* at 24-25. This is true but irrelevant. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification"). A claimant under § 1985(3) must show discriminatory *animus*, not *impact*. *Carpenters v. Scott*, 463 U.S. at 834-35. A campaign to stop production of a medically hazardous intrauterine device does not reflect gender bias just because only women

can use an IUD. A boycott of Nestle products designed to stop that company from marketing baby formula in the Third World is not gender-based just because the alternative to bottle-feeding is breast-feeding. Acts of civil disobedience against a manufacturer of tampons that have been associated with toxic shock syndrome do not constitute instances of sex-discrimination just because only women can use the products. Respondents therefore err by asserting that opposition to abortion is motivated by an animus against women just because only women can become pregnant.

Under respondents' rationale, this Court would need to review every law affecting abortion (or for that matter, pregnancy or childbirth) under the standards applicable to sex discrimination. This Court has never so held.

It is true that Congress has specifically chosen, by statutory amendment, to treat *pregnancy* discrimination as a surrogate for sex discrimination *in the context of employment*. *See International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1203 (1991). Congress, however, has not passed any similar amendment to either § 1985(3) or the Constitution itself.

Respondents would interpret the decision of this Court in *Johnson Controls* to have overruled, *sub silentio*, the prior decisions of this Court (*Geduldig v. Aiello*, 417 U.S. at 496 n.20, and *General Electric Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976)) which recognized that discrimination tied to pregnancy is not the same as sex discrimination. *See* Brief for Respondents at 25-26. But *Johnson Controls* did no such thing. Rather, *Johnson Controls* merely held that a policy which *by its terms* excludes "women" with childbearing capacity from certain jobs "explicitly discriminates against women." 111 S. Ct. at 1202. This is no more than the statement of a tautology. Indeed, the *Johnson Controls* Court went on to clarify that the policy at issue was not "facially neutral," with only a "discriminatory *effect*" upon women, *id.* at

1203 (emphasis added), because the policy classified *in so many words* "on the basis of *gender* and childbearing capacity, rather than fertility alone," *id.* (emphasis added). The reference to "gender and" childbearing capacity would have been meaningless had "childbearing capacity" itself sufficed as a sex-based term.

In the present case, of course, respondents have established *no* facial discrimination, nor even an *impact* on childbearing capacity, much less on pregnancy. Respondents' claim is that a mere *impact* on *abortion* is automatically a form of sex discrimination. Neither *Johnson Controls* nor any other decision of this Court can be stretched far enough to sustain such a proposition.

Respondents contend that abortion is a "constitutionally protected right of women as a class." Brief for Respondents at 28. This propostion is highly questionable. The status of *Roe v. Wade*, 410 U.S. 113 (1973), is very uncertain in light of *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). *Roe*, moreover, located an abortion liberty within a right of *individual privacy*, *see* 410 U.S. at 153, not within respondents' novel concept of a "constitutional right of a class." But in any event, the constitutional status of abortion—whatever it may be—is simply irrelevant to the question of the *animus* of petitioners. There is absolutely no reason to believe that petitioners consider abortion essential to female equality, or that petitioners wish to forestall that equality. There is likewise no reason to believe that considerations of this sort underlay petitioners' opposition to abortion.[8] On the contrary, petitioners view abortion in straightforward fashion as the unjust killing of innocent children. *E.g.*, 726 F. Supp. at 1488 (Pet. App.

[8] It is perhaps for this reason that respondents resort to speculative psychoanalysis of petitioners' motives. Brief for Respondents at 32-33. Lacking any evidence of a sex-based animus, respondents can do no more than indulge in unfounded suspicions regarding hypothetical secret motives for petitioners' anti-abortion stance.

20a) (affidavit of petitioner Randall Terry) (abortion business is a "child-killing facility").

Respondents may honestly believe that any threat to the practice of human abortion is a threat to female equality.[9] But by no means does § 1985(3) incorporate respondents' tendentious and controversial point of view into federal law.

Petitioners are motivated by an "intense commitment to their *anti-abortion* goals," 726 F. Supp. at 1491 (Pet. App. 26a) (emphasis added), not some secret anti-female bias. The court below improperly assumed a legal equation between opposition to abortion and opposition to women.[10]

B. Respondents Have Not Established the Requisite Violation of a Right Protected Under § 1985(3).

The other fatal defect in respondents' claim under § 1985(3) is respondents' failure to establish that petitioners threatened or violated some independently existing right secured under § 1985(3). "Section 1985(3) provides no substantive rights itself," *Great American*

[9] As indicated in the Brief of Feminists for Life of America, et al., as Amici Curiae, the early feminists of this nation took exactly the opposite view, *see id.* § II. These women, who regarded abortion as, for example, "murder of the innocents," *id.* at 18 (quoting Pauline Wright Davis), would, according to respondents, be guilty of a clear anti-female animus.

[10] It is true, as respondents point out, Brief for Respondents at 28-29, that a discriminatory class animus may motivate conduct that has an impact on those not belonging to the targeted class—for example, white Republican supporters of the newly freed slaves. Thus, the fact that a pro-life rescue prevents everyone—male or female—from entering an abortion business would not alone rebut a charge of anti-female animus *where there was already sufficient evidence of such animus.* But where, as here, there is a complete *absence* of any evidence of anti-female animus, the fact that pro-life rescuers block all comers serves only to confirm the uncontested fact that the true "animus" of petitioners is opposition to the practice of abortion, not opposition to equality for women.

Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979); hence, the "rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere," *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 833 (1983).

Respondents have relied upon two asserted rights: a right to interstate travel, and a right to abortion. Neither right is implicated here. *See* Brief for Petitioners § I(B).

1. *Respondents have not established a violation of any right to travel.*

Respondents have argued that any obstruction of access to a facility violates a constitutional right to interstate travel if some patrons of the facility come from out of state. Petitioners have already demonstrated the absurdity of this view of the constitutional right to travel. Brief for Petitioners § I(B)(1); *see also* Brief Amici Curiae of Daniel Berrigan, S.J. et al. (providing comprehensive analysis of right to travel).

In their answering brief, respondents have, if anything, adopted an even more extreme position on the scope of the right to travel. Respondents now argue unabashedly that this right encompasses "mere physical movement" and applies even "in the absence of discrimination against an interstate or out-of-state traveler," Brief for Respondents at 41. Respondents also maintain that this unprecedented and unlimited constitutional "right to move" applies in the absence of state action. *Id.* at 36, 37-38. Such a boundless "right" is completely without constitutional warrant.

Respondents also propose, for the first time in this litigation, that blockades of abortion businesses violate a "right to engage in interstate commerce," *id.* at 35. Respondents did not raise or argue this claim in their complaint, *see* Amended Complaint at ¶¶ 38-41 (J.A. 15-16), or in the courts below. Thus, respondents have

waived any such claim. It should be noted, however, that under the expansive commerce precedents of this Court, recognition of a personal "right to engage in interstate commerce" enforceable against purely private interference would mean no less than the total abolition of all distinction between state tort law and federal civil rights laws.

Respondents suggest that this Court should treat the *legal conclusion* of the district court, that petitioners conspired "for the purpose . . . of depriving women seeking abortions . . . of the right to travel," 726 F. Supp. at 1493 (Pet. App. 29a-30a), as a *finding of fact*. Brief for Respondents at 35-36. This argument is misguided. The *fact* is that a pro-life "rescue" seeks to prevent anyone from entering an abortion business. The *legal* question is whether such obstruction infringes a constitutional right to interstate travel. The district court correctly denominated its statement as a "conclusion of law," although that court reached an incorrect legal conclusion.

Respondents repeatedly confuse the constitutional *power* of Congress with the statutory *scope* of § 1985(3). Even if Congress *could* have enacted a general federal tort of obstruction, this would not mean that § 1985(3) is such a law. *See Carpenters v. Scott*, 463 U.S. at 833 ("Neither is respondents' position helped by the assertion that . . . [Congressional] authority to proscribe exclusively private conspiracies . . . *could* be [derived from] the Commerce Clause. That is no doubt the case; but § 1985(3) is not such a provision, since it provides no substantive rights itself . . .") (emphasis added; internal quotation marks and citation omitted). On the contrary, this Court has specifically held that the Congress that enacted § 1985(3) sought to limit the scope of the statue precisely to avoid creating "a federal remedy for 'all tortious, conspiratorial interferences with the rights of others,'" *Scott*, 463 U.S. at 834 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971)). Thus, cases such as *Katzenbach v. McClung*, 379 U.S. 294 (1964),

which address the *power* of Congress to legislate in the area of interstate commerce, are not relevant to the question of the *scope* of § 1985(3).

Respondents specifically rely upon *Griffin v. Breckenridge* for the proposition that plaintiffs under § 1985(3) need only show that " 'they had been engaging in interstate travel or intended to do so,' " Brief for Respondents at 42 (quoting *Griffin*, 403 U.S. at 106). But respondents take the quoted language totally out of context. In the full context of the opinion, the quoted language relates to the constitutional *authority* of Congress, not the scope of either § 1985(3) or the right to travel. The *Griffin* Court had already concluded, earlier in its opinion, that the plaintiffs had "state[d] a cause of action under § 1985(3)," 403 U.S. at 103. The language quoted above related only to the *separate question* "whether Congress had constitutional power" to impose liability under the circumstances of the case. *Id.* The Court concluded, not that the complainants personally possessed a constitutional right to interstate travel that was enforceable against purely private parties, but that it "is within the *power* of Congress to protect" a right to travel in this context, *id.* at 106 (emphasis added). The language respondents quote sufficed only to show "that the [plaintiffs] had suffered from conduct that *Congress may reach under its power* to protect the right of interstate travel," *id.* (emphasis added). *Griffin* did *not* hold that any private tortious interference with anyone who happened to be engaged in interstate travel would represent a federal constitutional violation. Indeed, such a reading of *Griffin* is completely incompatible with the Court's painstaking efforts to construe § 1985(3) to *avoid* converting it into a general federal tort law. *See* 403 U.S. at 101-02.[11]

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[11] Such a reading of *Griffin* would also be at odds with the decisions of this Court regarding the scope of the right to interstate travel. This right protects against *discrimination on the basis of residency, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972) (new resi-

2. *Respondents have not established a violation of any right to abortion.*

Respondents have conceded the absence of state action, and thus cannot establish a violation of any abortion right as a predicate for their § 1985(3) claim. Brief for Petitioners § I(B)(2).[12]

Respondents propose, for the first time, that an abortion claim might suffice under a *different* clause of § 1985(3), the "preventing or hindering" clause. *See* Brief for Respondents at 43-44. But respondents did not bring suit under this part of § 1985(3), *see* Amended Complaint ¶¶ 38-41 (J.A. 15-16) (alleging causes of action only under the first clause of § 1985(3)), and respondents did not argue any such claim in either of the courts below. Respondents have therefore waived this argument. *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1336 n.3 (1990) (refusing to affirm judgment below on the basis of an alternative argument "not presented to either court below, nor . . . supported by arguments in the record"). Furthermore, there is no reason to believe that the "equal protection" language of this second

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dents denied right to vote for one year), or actions taken with the "*primary objective*" of deterring interstate migration, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality) (emphasis added). The right to travel does *not* create a federal tort of obstruction, either for the general populace or as a special privilege of interstate travelers. *See* Brief for Petitioners § I(B)(1); Brief Amici Curiae of Daniel Berrigan, S.J. et al. (reviewing cases).

[12] Respondents attempt to postpone the demise of this claim by arguing that the issue is not before this Court. Brief for Respondents at 42-43. But this Court has granted review of the question whether respondents' claim under § 1985(3) is so insubstantial as to deprive the federal courts of subject matter jurisdiction (Question #4). Resolution of this question requires an assessment of the substantiality of respondents' abortion claim. The frivolousness of this claim—a claim already rejected by every court to address the issue, *see* Brief for Petitioners at 32-33—is therefore properly before this Court.

clause, *see* § 1985(3), would not entail the same statutory requirements of animus and independent rights which respondents have failed to satisfy under the first clause of the statute.

Respondents lamely argue that state action is not really a requirement under § 1985(3) even when the right asserted is only valid against state action. Brief for Respondents at 44. *Scott*, however, rejected that argument. 463 U.S. at 823-33.[13] Respondents suggest indirectly that *Scott* be overruled on this point, *id.* (citing the dissent in *Scott*), but provide no rationale for this precipitous course.

Finally, respondents half-heartedly assert that there is indeed a constitutional right to abortion that is effective against purely private action. Brief for Respondents at 45. This Court should decline respondents' invitation to initiate such a jurisprudential revolution.

II. RESPONDENTS' CLAIM UNDER 42 U.S.C. § 1985(3) IS TOO INSUBSTANTIAL TO SUPPORT FEDERAL SUBJECT MATTER JURISDICTION.

Respondents' claim under 42 U.S.C. § 1985(3) is "so attenuated and unsubstantial as to be absolutely devoid of merit" and is therefore insufficient to support federal subject matter jurisdiction, *see Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (internal quotation marks and citation omitted). Petitioners have already elaborated upon this argument, Brief for Petitioners § II, and respondents have not provided any serious response.

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[13] Respondents' attempt to distinguish *Scott* by conjuring up a distinction between "state action" and "state involvement" is unavailing. Respondents cite no authority for such a proposition. Moreover, the present case involved an alleged conspiracy that was entirely private, and *Scott* explicitly rejected the applicability of § 1985(3) when "wholly private" conspiracies were alleged to deny a right protected only against state action, 463 U.S. at 833.

Respondents argue that their claim cannot be insubstantial because it has been "explicitly endorsed by two courts of appeals and seven district courts." Brief for Respondents at 45-46. In reality, the use of § 1985(3) against anti-abortion rescue activities has only been "explicitly endorsed" by *one* court of appeals other than the court below—namely, the Second Circuit, in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). The "other" federal appeals court to sustain such a claim was the Fourth Circuit in the very decision now on review before this Court. In its ruling on the applicability of § 1985(3), moreover, the court below simply followed *New York State NOW* without any independent analysis. *See* 914 F.2d at 585 (Pet. App. 8a).

In any event, respondents' argument amounts to a claim that this Court is bound, on the issue of subject matter jurisdiction, by the rulings of *lower* federal courts —even when they are divided, *see* Pet. for Cert. § I (noting the conflict among the federal courts of appeals and district courts). This is obviously an inversion of the true order of the judicial system.

III. THE AWARD OF COSTS AND ATTORNEYS FEES MUST BE VACATED.

The award of costs and attorneys fees to respondents must fall with the reversal of the judgment below. *See* Brief for Petitioners § III.

Respondents do not provide any new argument on this issue, and therefore no further discussion is necessary. It bears mention, however, that the award of attorneys fees to respondents cannot stand because of the meritlessness of respondents' *federal* claims. Once this Court rejects respondents' claims under § 1985(3), the award of fees must be overturned, even if this Court were to hold that these federal claims, though unmeritorious, were nevertheless sufficiently substantial to support pendent

jurisdiction.[14] Brief for Petitioners at 36-37 (citing cases).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the opening Brief for Petitioners, this Court should reverse the judgment of the court of appeals and vacate the award of costs and attorneys fees to respondents.

Respectfully submitted,

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June 12, 1991

[14] Were the Court to reach such a conclusion, the proper course would be to reverse the award of fees and costs, vacate the judgment below, and remand for consideration of the propriety of exercising pendent jurisdiction in the absence of any valid federal claim. (The court below had declined to disturb the exercise of pendent jurisdiction "[i]n light of our disposition of the federal question," 914 F.2d at 586 (Pet. App. 9a); thus, the court of appeals should be given the opportunity, on remand, to reconsider this issue, should this Court hold that the respondents' federal claims, though meritless, were not jurisdictionally insubstantial.)